IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 11104 OF 2001
With
SPECIAL CIVIL APPLICATION NO. 11105 OF 2001
With
SPECIAL CIVIL APPLICATION NO. 11108 OF 2001
With
SPECIAL CIVIL APPLICATION NO. 11112 OF 2001
To
SPECIAL CIVIL APPLICATION NO. 11113 OF 2001
With
SPECIAL CIVIL APPLICATION NO. 11118 OF 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the Civil Judge ?

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PORBANDAR DISTRICT PANCHAYAT - Petitioner(s)
Versus
GOVINDGAR BUDHGAR - Respondent(s)

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Appearance :
Shri H. S. Munshaw for Petitioner(s).
Shri B. M. Mangukiya for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 11/07/2007

COMMON ORAL JUDGMENT

The petitioner-District Panchayat, being aggrieved by the award dated 8th June, 2001 made by the learned Presiding Officer, Labour Court, Junagadh in Reference (LCJ) Nos. 219 of 1993 to 224 of 1993, is before this Court with a submission that the award made by the learned Labour Court is patently illegal and deserves to be quashed.

2. Shri H.S. Munshaw, learned Counsel for the petitioner, has raised the following grounds:

(a) The burden to prove that the workman had worked for 240 or more days in twelve calendar months preceding the date of illegal retrenchment, was on the workman and as in this case, the respondents-workmen failed to discharge the burden, the order of reinstatement could not be made.

(b) The workmen had approached the learned Labour Court almost after ten years, therefore, this delay on the part of the workmen should defeat their case and cause. The learned Labour Court, in the facts and circumstances of the case, should not have awarded 100% back-wages for the period *pendente lite*.

It is made clear that barring these two questions, no other question was raised.

3. Shri B.M. Mangukiya, learned Counsel for the respondents-workmen in each of the Writ Applications, submits that true it is, that the burden to prove that the workman had worked for 240 or more days is on the workman, but, in the present case, the workmen made requests to summon the muster rolls/service records, but, the present petitioner did not produce the original records and under the circumstances, the statement of working days submitted by the present petitioner would assume no importance.

4. It was submitted that the delay would not defeat the case and cause of the workmen because the question of limitation does not arise in a matter like this. Delay at the best would affect the entitlement of the workman to get the back-wages. He also submitted that there was nothing wrong on the part of the workmen if the matter remained pending for eight years before the learned Labour Court. According to him, the Courts are overburdened and with the load of the work, if the cases cannot be disposed of at their earliest, then, the party – litigant should not suffer because of the delay.

5. It is not in dispute before me that despite application by the

workmen for production of the muster rolls/service records, the present petitioner-employer did not produce the original records. They were happy and content after filing the statement of working days. It is to be seen that the statement of working days is prepared on the basis of the original records. The statement of working days is not the primary evidence, but, is the secondary evidence. The secondary evidence to prove a fact is only admissible in evidence if the primary evidence is not available or with the best efforts of the parties, it cannot be traced out. If the primary evidence is available, then, the burden is upon the party to prove a particular fact by producing the primary evidence. In the present case, the primary evidence was and is in possession of the present petitioner. Once the correctness of the contents of the statement/certificate of working days is required to be verified, then, availability of the original records is a must. The statement in relation to working days is, in fact, an *ipse dixit* of a party in its own favour. If the original records have not been produced by the petitioner, then, they cannot be allowed to say that the burden that the workman had worked for 240 or more days, was not discharged by the workman. It would be too much to say that an adverse inference is to be drawn, against the party for not proving the facts, in favour of the party, which possesses the original evidence, refuses to produce the same in the Court and sits tight over it. The argument is rejected.

6. So far as the question of delay is concerned, it would be trite to say that for making the reference, no limitation is prescribed. Different Courts, including the Apex Court, have said that if there is unnecessary or unexplained delay in making the reference, then, the Labour Court may refuse to interfere in the matter or if it proposes to interfere, it may refuse to award the back-wages. In the present case, the learned Labour Court thought it fit to interfere in the matter and has refused the back-wages for the period prior to the date of the reference. Once the Court exercises its discretion for making an interference in the matter, then, it would not be proper for the High Court, especially, under Article 227 of the Constitution of India, to substitute its opinion and interfere with the discretion exercised by the subordinate Court or Tribunal.

7. So far as 100% back-wages *pendente lite* are concerned, in the opinion of this Court, though the principle of "No work, No pay" would apply, but, the Court cannot be oblivion to the facts that one should not be awarded something if he had not earned it. Ordinarily, the salary is to be paid for the work done. In the present case, the respondent though were ready and willing but were engaged in the litigation and the State was *bona fide* contesting the litigation, therefore, award of 100% wages would not be appropriate. The award of 100% wages, in the opinion of this Court, should be modified with a direction

that each of the workmen would be entitled to 50% wages from the date of the reference till the date of the award and would also be entitled to the benefits of continuity of service, grades, seniority, etc. in accordance with law from the date of their illegal retrenchment.

8. All the petitions are partly allowed. Rule is made absolute to the aforesaid extent. No costs.

[R.S.Garg, J.]

*kamlesh**